Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL FILE

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

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OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF JEFFREY ROCHLIS

Jeffrey Rochlis ("Rochlis") hereby files comments in the above-referenced proceeding. More specifically, Rochlis proposes (1) that the Commission adopt the "finder's preference" as originally proposed by Rochlis, (2) that the Commission not utilize local residence as a separate criterion, (3) that the Commission modify the application of the diversification criterion, (4) that the Commission retain the use of the minority preference and the spectrum efficiency criterion in the comparison of applications for a new broadcast facility, and (5) that the Commission apply its new criteria prospectively to all applications which have not yet been designated for hearing. In support of these proposals, the following is stated:

1. As the Commission's Notice of Proposed Rulemaking ("Notice") acknowledges, Rochlis proposed the adoption of a "pioneer's preference" in proceedings under General Docket No. 90-264. Although the Commission has now labeled the proposal

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KECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

as one for a "finder's" preference, the content remains the same. The public interest benefits of the proposal also remain unchanged, and Rochlis' earlier pleadings are hereby incorporated by reference. The two (2) most significant pleadings filed by Rochlis -- comments of March 8, 1991 on the NAACP's petition for reconsideration and comments of August 8, 1991 in RM Nos. 7740 & 7741 -- are annexed hereto.

2. As explained in Rochlis' earlier pleadings, adoption of a finder's preference will provide significant public benefits, particularly if the Commission refines the comparative criteria as proposed herein.

3. First, the Commission should not retain local residence as a separate criterion if integration is eliminated as a factor. The elimination of integration will presumably reflect the Commission's judgment that there is no reasonable basis to assume that an integrated owner will provide more responsive programming than a professional manager. In that event, it becomes equally difficult to assume that an owner who has lived in the community -- and who may <u>not</u> be integrated into management -- would provide better service than an owner who has not previously lived in the community -- and who may be integrated into management. In short, in the absence of integration, there would be no basis for the Commission to

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assume that a local resident's knowledge of the community would be reflected in programming decisions.

4. Second, the Commission should modify the diversification criterion and limit its applicability to ownership of other media in the same market. In expanding the ownership limits for commercial radio a couple of months ago, the Commission observed that audiences in a local market

> perceive program and viewpoint diversity in terms of the ideas available to them locally, regardless of what ideas are available in other broadcast markets. As we indicated in 1984, "[f]or an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local market."

Revision of Radio Rules and Policies, FCC 92-97 (1992) at ¶20 (footnote omitted). Consideration of media ownership outside the local market under the comparative diversification analysis is inconsistent with that practical perspective. Consideration of distant media interests also complicates the Commission's goal of trying to develop a precise scheme for the allocation of points: given the variety of circumstances attending ownership of outside media interests, it would be difficult to devise a scheme that would be rational and sufficiently definitive to permit the allocation of points. Therefore, the diversification criterion in comparative situations should be confined to ownership of media interests in the same

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market as the community of license (assuming compliance with the multiple ownership rules).[1]

5. Third, the preferences for spectrum efficiency and minorities should obviously be retained. An additional comment, however, is warranted with respect to interaction of the minority preference and a finder's preference.

6. As explained in Rochlis' earlier pleadings, the minority preference does not appear to have generated the benefits that were envisioned for it. See Rochlis' Response to Comments (RM Nos. 7740 & 7741 Aug. 8, 1991) at 7-13. Indeed, in recognition of that unrealized benefit, the NAACP, the League of United Latin American Citizens, and the National Black Media Coalition have proposed other substantive changes in the comparative criteria to enhance the likelihood that minorities will secure licenses through the comparative process. See Reexamination of Policy Statement on Comparative Broadcast Hearings, DA 92-614 (GC May 20, 1992). However well intentioned, those additional criteria would still require the expenditure of substantial sums over a lengthy period and thus

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[1] To the extent it is concerned with large multiple owners taking advantage of a finder's preference, the Commission could specifically state that an applicant with a certain threshold number of broadcast facilities (such as five or ten) would automatically receive a diversification demerit of a certain magnitude.

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KECK, MAHIN & CATE
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PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

continue to force minorities to become involved in the "'strange and unnatural' business arrangements" identified in Bechtel v. FCC, No. 91-1112 (D.C. Cir. Jan. 31, 1992), Slip. Op. at 14. The finder's preference may provide a more effective alternative. If minorities and organizations devoted to their betterment expended their limited resources to the publicizing and filing of proposals and counterproposals for new allocations, the minority preference -- coupled with a finder's preference -- would place the minority applicant in a position of significant strength, would probably discourage the filing of competing applications, and would probably result in a more frequent award of licenses to minorities.[2]

7. To the extent the finder's preference proved successful in facilitating minority ownership of new broadcast stations, the Commission's concern with the Anax policy would be largely eliminated. Since allocation proceedings generally require far less resources than a comparative proceeding, it is possible, if not likely, that minorities could participate in allocation proceedings and ultimately secure licenses without the need for non-minority investors and the concomitant problems of two-tiered organizations.

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[2] Under Rochlis' proposal, any party filing a counterproposal in a rulemaking proceeding would also receive a finder's preference.

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8. Finally, the new criteria should be applied prospectively to applications which have not yet been designated for hearing. As explained in the Notice, applicants who are not in hearing have not yet expended considerable sums to prosecute their respective applications and, therefore, would not be unfairly prejudiced by adoption of the new criteria.

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission adopt the finder's preference as proposed by Rochlis and modify the comparative criteria as otherwise proposed herein.

Respectfully submitted,

KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 789-3400

Attorneys for
Jeffrey Rochlis

By: _____
Lewis J. Paper

LAW OFFICES OF
KECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

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In the Matter of	)	
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Proposals to Reform the	)	
Commission's Comparative	)	Gen. Doc. No. 90-264
Hearing Process to Expedite	)	
the Resolution of Cases	)	

To: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION OF THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Lewis J. Paper

KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 789-3400

March 8, 1991

Attorneys for Jeffrey Rochlis

LAW OFFICES OF
KECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

SUMMARY

Jeffrey Rochlis proposes that the Commission award a "Pioneer's Preference" in any comparative proceeding for a new FM or television station to the applicant which has successfully secured a Commission order allocating the new FM or television station. The preference should be sufficiently strong to (1) properly reward the party for the effort in identifying a new broadcast service, and (2) discourage the filing of competing applications. The policy should be applied immediately to all pending cases which have not yet been designated for hearing.

Adoption of the preference will eliminate a major inequity in the current process and help expedite the disposition of pending and future applications. The current scheme is plainly unfair to a party who assumes the burden of finding a new allocation and then must face competing applicants who have stood on the sidelines. The current system is also unfair to the public, since initiation of service is delayed for years while the Commission processes mutually exclusive applications. This delay is particularly unfortunate since most new allocations involve communities which have few, if any, FM or television stations.

Adoption of the Pioneer's Preference would be of particular benefit to minorities, women, and other newcomers to the broadcast field. The legal costs of prosecuting an application in a comparative hearing involve tens, and sometimes hundreds, of thousands of dollars. To some, those

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PENTHOUSE
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costs are prohibitive. Others seek the support of investors who become so-called passive investors (a situation which has often resulted in the filing of "sham" applications). Adoption of a Pioneer's Preference will enable minorities, women, and other newcomers to become broadcast licensees without having to face those prohibitive costs or seeking the assistance of so-called passive investors.

Adoption of the Pioneer's Preference is consistent with the Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), which requires a full hearing for competing broadcast applicants. The Pioneer's Preference does nothing more than introduce a new criterion, albeit a significant one, in the Commission's evaluation of competing applications. Adoption of the preference will not deprive any competing applicant of a full hearing or preclude Commission evaluation of any information a competing applicant brings to the Commission's attention.

Nor is there any bar to Commission application of the Pioneer's Preference to pending cases which have not yet been designated for hearing. Courts have repeatedly recognized the right of federal agencies to apply new policies to pending cases. The Commission itself has often applied changes in comparative policies to pending cases.

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PENTHOUSE
1 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

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To: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Jeffrey Rochlis ("Rochlis), acting pursuant to the Commission's Public Notice of February 13, 1991, DA 91-174, hereby files comments on the petition of the National Association for the Advancement of Colored People, et al. (collectively referred to herein as the "NAACP") for reconsideration of the Report and Order which the Commission adopted in the above-referenced docket. FCC 90-410 (December 21, 1990).

Introduction

In its Report and Order, the Commission observed that, regardless of their merit, the proposals advanced by the NAACP with respect to the Commission's comparative criteria will have no bearing on the overriding goal of this docket to expedite the disposition of applications for new broadcast stations. However, there is one change that the Commission could make in the comparative criteria which would eliminate a

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ECK, MAHIN & CATE
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1201 NEW YORK AVENUE, N.W.
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major inequity in the process and simultaneously expedite service to the public. More specifically, if a party files a rulemaking petition which results in the allocation of a new FM or television station, the Commission should accord that party substantial credit -- a "Pioneer's Preference" -- in any subsequent comparative hearing. The preference should be sufficiently strong to (1) properly reward the party for the effort in identifying a new broadcast service, and (2) discourage the filing of competing applications.

I. Rochlis' Interest

Rochlis is a resident of California. On September 29, 1989, after the expenditure of considerable time and money, Rochlis filed a petition with the Commission under Section 1.401 proposing the allocation of a new FM station (on Channel 234A) to Thousand Palms, California (which is near a residence maintained by Rochlis). The new station would represent Thousand Palms' first FM service.

The Commission issued a Notice of Proposed Rulemaking on January 31, 1990. MM Docket No. 90-12, RM-7087. Rochlis was the only party to file comments in response to the notice. On November 26, 1990, the Commission adopted the proposed rule and amended the Table of Allotments to include Channel 234A in Thousand Palms, California.

On February 11, 1990, Rochlis filed with the Commission an application for a construction permit to build a station on

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Channel 234A in Thousand Palms. Seven (7) other parties filed mutually exclusive applications.

II. Background: The Problem

The current system for authorizing new FM and television service is inequitable and inconsistent with any goal of expedition. A party must first expend time and money to identify a new channel that can be allocated without causing unacceptable interference to existing allocations. If a party is able to identify a permissible location, the party must file a petition for rulemaking under Section 1.401 requesting an amendment to the Table of Allotments. If the party's engineering is satisfactory, and if the proposal is otherwise in accord with applicable law, the Commission will issue a notice of proposed rulemaking inviting comment on the proposal. If, after consideration of the comments, it is determined that the proposal complies with all applicable engineering and legal requirements, the Commission will issue a report and order adding the new service. At that point, the new facility is made available for application by any party.

The current scheme thus allows -- and, to some extent, even encourages -- prospective applicants to sit back on the sidelines while another party assumes the burden of establishing a new allocation. The scheme is plainly unfair to the party who takes up that burden and identifies a new allocation -- only to find afterwards that any hope for a Commission authorization must await the outcome of a

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KECK, MAHIN & CATE
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1201 NEW YORK AVENUE, N.W.
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comparative hearing involving other mutually exclusive applications, some of which may have more merit under the Commission's current comparative criteria.

The current scheme is also unfair to the public. Initiation of service is usually delayed several years while the Commission processes mutually exclusive applications in a comparative hearing. In many, if not most, cases, the delay is particularly unfortunate since new allocations usually involve communities which have few, if any, assigned FM or television stations. In other words, the community must not only wait a year or longer for disposition of a rulemaking proposal. The community must then await the final disposition of a comparative broadcast proceeding which, as the Commission well knows, can take two or more years (and will continue to do so even if the reforms adopted in the instant docket are as effective as the Commission hopes in expediting cases).

Rochlis' situation illustrates the problem. In early 1989 Rochlis undertook efforts to identify a community in southern California that could benefit from additional FM service. Rochlis' September 1989 petition to the Commission was the fruit of that effort. After fourteen (14) months, the Commission issued an order making the allocation of Channel 234A to Thousand Palms, California. Now, despite his success in identifying a community which does not currently have any FM service, Rochlis must participate in a comparative proceeding which he may not win and which could take years to

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resolve. In the meantime, the community of Thousand Palms must await the outcome of that proceeding before getting its first FM service.

There is nothing in the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq., which dictates the Commission's current procedure for the allocation of new FM and television stations or the particular criteria the Commission utilizes in comparative broadcast proceedings. Therefore, the Commission has the discretion to change the procedure.

III. Proposed Solution: A "Pioneer's Preference"

The Commission should adopt a policy under which a party who successfully proposes a new FM or television allocation will receive a "Pioneer's Preference" in any comparative proceeding involving the new allocation. The Pioneer's Preference should be of substantial weight. To that end, the comparative weight should be at least the equivalent of twice the weight presently assigned to the full-time integration of 100 percent of an applicant's owners. This new policy should be made effective immediately and applied to all pending applications except for those that have already been designated for hearing.[1]

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[1] This Pioneer's Preference should be assigned to every party who participates in a rulemaking proceeding for a new allocation and proposes an amendment to the Table of Allotments which is viable under applicable legal and engineering parameters. Thus, if one party files a petition (continued)

The use of a Pioneer's Preference in comparative criteria is premised on the purpose of those criteria. The comparative criteria reflect the Commission's assessment of factors that will facilitate a predictive judgment as to which applicant would be better able and willing to serve the community. For example, the Commission currently places considerable weight on the extent to which a prospective licensee's owners will be integrated into the management of the proposed station because of the Commission's assumption that "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." Policy Statement, 1 FCC2d 393, 395 (1965). The Pioneer's Preference proposed herein will be another factor reflecting a party's ability and willingness to serve the community. The preference will be bestowed on a party which has taken the initiative and expended the resources to find a new broadcast service for a community. In achieving that goal, the successful proponent has contributed to the diversity of viewpoint in the country and demonstrated a commitment to service which is at least as predictive, if not more so, than the integration factor.

(continued)
for rulemaking with a viable proposal, and a second party files comments proposing a viable alternative, then, in that event, both parties would receive the Pioneer's Preference even though only one of the proposals is adopted by the Commission. In both cases, a party has expended time and money to devise a proposal that will bring new broadcast service to the public.

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The substantial weight of the Pioneer's Preference should be sufficient to enable the so-called pioneer to prevail in many, if not most, comparative situations. But assignment of the Pioneer's Preference should not enable the pioneer to prevail in any and every comparative case. Competing applications would still have a full hearing and could, under certain circumstances, be granted over the pioneer's application. Thus, a pioneer with many other media interests would receive a diversification demerit which could offset the weight of the Pioneer's Preference. A competing applicant might also be able to prevail in the event that the pioneer was disqualified because of misrepresentations, lack of financial qualifications, or unavailability of a tower site. Some examples illustrate how the Pioneer's Preference could be applied:

> Example 1. A party successfully secures a Commission order allocating a new FM station to a community. The party files an application and thus becomes entitled to the Pioneer's Preference. The party has no other media interests and is otherwise qualified to be a Commission licensee. The applicant does not propose to be integrated full-time into the management of the station. The pioneer would prevail in a comparative hearing with another applicant which has no diversification demerits and does propose to be integrated full-time into management.

> Example 2. A party with substantial broadcast interests successfully secures an allocation for a new FM station in a community. The party is entitled to the Pioneer's Preference. Another party with no diversification demerits files a competing application and proposes 100 percent full-time integration. The Commission would have to use the parameters set forth in the 1965 Policy Statement to determine whether the pioneer's diversification

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demerits offset the Pioneer's Preference. Based on that analysis, the competing applicant could prevail.

Example 3. A party successfully secures a Commission allocation of a new FM station in a community. The pioneer has no diversification demerits. However, a competing application is filed by a party with no diversification demerits who proposes a specialized program service to meet significant unmet needs. The competing applicant also proposes 100 percent full-time integration. The Commission will have to decide whether the specialized program offering, coupled with the competing applicant's full-time integration, is sufficiently important to offset the Pioneer's Preference.

Adoption of a Pioneer's Preference in the comparative process will provide immediate and dramatic benefits. First and foremost, the preference will expedite the disposition of pending and future applications involving new facilities authorized pursuant to a rulemaking proceeding. In situations involving pending cases which have not yet been designated for hearing, many, if not most, competing applicants will abandon their respective applications rather than face an applicant with a Pioneer's Preference. In future situations, prospective applicants will think long and hard before filing a competing application against a party with a Pioneer's Preference.

There are other public interest benefits as well. As the Commission knows, minorities, women, and other prospective newcomers to the broadcast field face a tremendous hurdle in pursuing an application for a new station. The prosecution of an application in a comparative hearing usually entails tens,

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and sometimes hundreds, of thousands of dollars in professional fees. These high costs are prohibitive to some and have forced others to seek assistance in two-tiered organizations sanctioned by the Commission's Anax policy. Prosecution costs are likely to remain high even after implementation of the reforms adopted in the instant docket. By adopting a Pioneer's Preference, the Commission will offer minorities, women, and other newcomers an opportunity to become broadcasters without having to face prohibitive prosecution expenses (or the financial support of so-called passive investors).

Consideration and adoption of the Pioneer's Preference thus falls squarely within the ambit of the instant proceeding. Although the proposal is not a strictly procedural one, it touches on issues that relate to the multiplicity of applications being filed and the time required to process them. In this sense, the Pioneer's Preference proposed herein is at least as relevant, if not more so, than the substantive changes which the Commission proposed in conjunction with policies enunciated under Anax Broadcasting, Inc., 87 FCC2d 483 (1981), and Ruarch Associates, 103 FCC2d 1178 (1986). See Proposals to Reform the Commission's Comparative Hearing Process, 5 FCC Rcd 4050, 4052, 4053 (1990).

The Commission has already proposed or decided to grant preferences for parties who propose new services in other

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areas. E.g. Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd 2766, 2767 (1990) ("Pioneer's Preference" to be awarded "to any successful petitioner for an allocation for a new service"); Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules, 5 FCC Rcd 6410, 6424 (1990), recon. pending (MMDS applications must be filed on same day to be mutually exclusive in order to prevent "application mills" from exploiting first applicant's effort and later filing a duplicate application). The public interest dictates that a similar preference be accorded to parties who successfully propose a new FM or televison service.

IV. Commission Authority to Adopt "Pioneer's Preference"

The Commission has ample authority to adopt the Pioneer's Preference proposed herein without violating the principles enunciated in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"). Ashbacker concerned a situation in which the Commission granted one mutually exclusive application and then designated the second application for hearing. The Supreme Court reversed, finding that the hearing on the second application placed an unfair burden on the applicant to demonstrate error in the Commission's grant of the first application. In reversing the Commission, however, the Court did not purport to dictate the criteria which the Commission should utilize in comparing applications or the weight to be assigned each criterion. As the Court itself

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ECK, MAHIN & CATE
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PENTHOUSE
1 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

explained, "We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." 326 U.S. at 333.

The Commission and the courts have subsequently acknowledged the broad discretion which the agency has in identifying and weighing criteria to be applied in comparative broadcast cases. Shortly after Ashbacker was decided, one court observed that the Commission "must take into account all the characteristics which indicate differences" as to which applicant would better serve the public interest, that the Commission has "wide discretion" in evaluating those differences, and that the Commission's judgment would be upheld by a reviewing court if the judgment is "within the bounds of rationale derivation from the findings." Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 356-57 (D.C. Cir. 1949).

The Commission's 1965 Policy Statement similarly acknowledged that neither the identity nor the weight of comparative factors could be fixed for all time or for all cases:

> . . . The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.
>
> Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of

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LECK, MAHIN & CATE
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PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

> particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228, and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. den., 350 U.S. 1007.

1 FCC2d 393 (1965) (footnote omitted). Although it recognized the inevitability of change, the Commission used the Policy Statement to set forth basic criteria which the Commission expected to apply in comparative broadcast cases. However, after reviewing the various factors, the Commission again emphasized that it retained the discretion to change the nature and weight of the factors to be considered in any comparative case:

> [B]y this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

1 FCC2d at 399.

As the Commission anticipated, individual cases have been utilized over the years to change and refine the comparative criteria described in the 1965 Policy Statement. E.g. TV 9,

LAW OFFICES OF
KECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973) (minority participation in management to be treated as a separate comparative criterion); George E. Cameron, Jr. Communications, 71 FCC2d 460, 465 (1979) (subsequent history omitted) (1965 Policy Statement revised to preclude inquiry into specialized program formats except upon certain pre-designation showings); Waters Broadcasting Corp., 91 FCC2d 1260, 1263, 1266 (1982), aff'd sub nom., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984) (minority ownership entitled to equal weight with local residence, and residence in service area outside community of license entitled to substantial local residence credit).

The foregoing authorities confirm the Commission's discretion to adopt the Pioneer's Preference proposed herein. Adoption of the preference will not deprive any party of the full hearing mandated by Ashbacker. Rather, the use of the preference will only introduce a factor, albeit of significant weight, to be considered in a certain class of cases.[2] In

[2] For this reason, the Pioneer's Preference does not run afoul of the court's decision in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), reh., 463 F.2d 822 (1972). In that case, the court set aside a Commission policy statement which would have granted the renewal application of an incumbent broadcaster without consideration of a challenger's application if the incumbent had provided programming "substantially attuned to meeting the needs and interests of its area" and its operation was not "otherwise characterized by serious deficiencies. . ." Policy Statement, 22 FCC2d 424, 425 (1970). The Pioneer's Preference, in (continued)

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ECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

this sense, then, the Pioneer's Preference is of far less significance in the comparative process than the "renewal expectancy" formulated by the Commission and approved by the court. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

V. No Bar to Immediate Application

Nothing in the Communications Act or in Commission decisions precludes immediate consideration of the Pioneer's Preference in all cases which have not yet been designated for hearing. Quite the contrary. The courts and the Commission have repeatedly acknowledged the Commission's authority to apply policy changes to pending applications.

At the outset, it must be remembered that the Commission's comparative criteria are not embedded within the Commission's rules, and, more importantly, no applicant is ever guaranteed that comparative criteria existent at the time of application will remain forever unchanged. Indeed, no applicant could have that expectation in the face of the

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(continued)
contrast, will not result in a two-stage hearing or preclude consideration of a challenger's application. Nor will the preference preclude evaluation of any information which any competing applicant wants to bring to the Commission's attention. If adopted, the preference will only constitute a judgment by the Commission of the significance which the preference has in serving the public interest. Moreover, in contrast to the policy statement struck down in Citizens Communications Center v. FCC, supra, the Pioneer's Preference proposed herein will promote First Amendment diversity interests by enhancing the opportunity of minorities, women, and other newcomers to enter the broadcast arena.

LAW OFFICES OF
KECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
202) 789-3400

Commission's admonition in the 1965 Policy Statement about the need to accommodate changes in the Commission's views as to what will best serve the public interest.

Numerous court decisions underscore the flexibility which the Commission can and often does bring to the task of formulating comparative policies. Perhaps the paradigm case is FCC v. WOKO, Inc., 329 U.S. 223 (1946). In that case, the Court upheld the Commission denial of a renewal application even though the Commission's decision relied on a shift in Commission policy concerning the significance of certain kinds of misconduct. As the Court explained, "The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable." 329 U.S. at 228.

Another court similarly sustained the Commission's formulation and application of a policy on "renewal expectancy" in an individual case even though the policy was not in place when the competing applications were first filed with the Commission. Central Florida Broadcasters, Inc. v. FCC, supra. The Commission has frequently made other changes in comparative policies and applied them to pending cases. See supra at 12-13.

LAW OFFICES OF
ECK, MAHIN & CATE
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400

The Commission's approach in the development and application of new comparative policies is consistent with the powers exercised by other federal agencies. Courts have repeatedly upheld the decisions of other federal agencies to apply new policies to pending cases. As one court explained,

> When not controlled by a regulation even an established approach or precedent may be modified or overruled. An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent. It may switch rather than fight the lessons of experience.

New Castle County Airport Commission v. Civil Aeronautics Board, 371 F.2d 733, 734-35 (D.C. Cir. 1966), cert. denied sub nom., Board of Transportation of New Castle County v. Civil Aeronautics Board, 387 U.S. 930 (1967) (citations omitted). Accord City of Chicago v. Federal Power Commission, 385 F.2d 629, 637 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968) (agency could apply a newly-announced policy on depreciation to resolve a pending case); Shawmut Association v. Securities & Exchange Commission, 146 F.2d 791, 796-97 (1st Cir. 1945) ("administrator is expected to treat experience not as a jailor but as a teacher"). The only requirement is that the agency rationally explain the nature of and need for the change in policy. New Castle County Airport Commission v. Civil Aeronautics Board, supra, 371 F.2d at 735; Environmental Defense Fund, Inc. v. Environmental Protection Agency, 510 F.2d 1293, 1299 (D.C. Cir. 1975); Greater Boston Television Corporation v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970),

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A PARTNERSHIP (INCLUDING
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PENTHOUSE
1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005
(202) 789-3400